A

HO WENG ON & ANOR

v.

BINDEV SDN BHD

B

HIGH COURT MALAYA, KUANTAN
SURAYA OTHMAN J
[CIVIL SUIT NO: 22-51-2006]
10 SEPTEMBER 2007

C ***CONTRACT:*** *Construction - Sale and purchase agreement - Pro Forma Sale and Purchase Agreement - Whether a valid and binding contract exists - Intention of parties - Identity of parties, identity of subject matter, price and essential terms of contract identified with sufficient clarity in Pro Forma Sale and Purchase Agreement - Whether Pro Forma was a valid and binding agreement enforceable at law*

D

CONTRACT: *Mistake - Common mistake - Sale of property - Property already been sold to a third party earlier - Vendors aware and purchaser not aware of earlier sale to third party - Whether vendor could rely on doctrine of common mistake to render contract void - Mistake a direct result of vendor's own wrong-doing - Whether sufficient evidence of common mistake*

E

CONTRACT: *Specific Performance - Sale and purchase of property - Breach of sale and purchase agreement - Property in question already been sold to a third party - Specific performance not appropriate - Exercise of court's discretion under ss. 18(2) and 21 of the Specific Relief Act 1950 not to grant specific performance but damages instead*

F

EQUITY: *Maxims of equity - Equity regards as to substance, not form - Pro Forma Sale and Purchase Agreement signed - Whether there was a valid and binding sale and purchase agreement between parties - Duty of court to scrutinize contents of documents and have regard to surrounding circumstances to determine actual intention of parties*

G

By a Pro Forma Sale and Purchase Agreement dated 6 February 2006, the plaintiffs agreed to purchase from the defendant a double-storey semi-detached house at the price of RM321,000. On the same day the

H Pro Forma Agreement was signed, the plaintiffs paid a deposit of RM5,000 to the defendant. Pursuant to clause 2 of the Pro Forma, the defendant was supposed to forward the official sale and purchase agreement to the plaintiffs for their execution which it failed to do so. The plaintiffs then commenced this action for specific performance.

I Subsequently after the filing of this action, it was discovered that the property had actually been sold to one Lai Chooi Peng on 23 February 2005. The plaintiffs applied under O. 81 r. 1(a) of the Rules of the

High Court 1980 for specific performance of sale and purchase of the property and damages in addition to or *in lieu* thereof. The defendant claimed that the Pro Forma was never intended by both parties to be binding. Alternatively the defendant claimed that even if there was a binding agreement, the agreement was void on grounds of common mistake as both parties were mistaken as to the availability of the said property for sale at the time of contract.

Held (allowing the plaintiff's application):

(1) When the parties of the transaction have been identified with sufficient clarity, together with the subject matter of the contract in question, the price and the terms the parties considered essential, there is a valid and enforceable contract. At the reverse side of the Pro Forma was the names of the purchasers (the plaintiffs), the Vendor (the defendant), the property to be sold and the price, all of which form the necessary ingredients for a valid and binding contract. When both sides of the Pro Forma were read together, there was no doubt that the defendant had contracted to sell and the plaintiffs had agreed to purchase the property. (paras 5 & 7)

(2) The Pro Forma was a valid and binding agreement and a *fortiori*, an agreement enforceable at law to ensure that the parties executed the official sale and purchase agreement. (para 12)

(3) Equity regards as to substance, not form. It is the duty of the court to scrutinize the contents of the documents and having regard to all the surrounding circumstances, determine what the actual intention of the parties were. (para 14)

(4) The only party who had the exclusive knowledge that the property has already been sold to a third party must be the defendant developer. The plaintiff purchasers must be taken to have no knowledge of this fact. In the premise, the defendant could not rely on the doctrine of common mistake to render the contract void since the mistake was a direct result of the defendant's own wrong-doing. (paras 23 & 27)

(5) Since the Property in question had already been sold to a third party, specific performance was not appropriate and the court would exercise its discretion by virtue of ss. 18(2) and 21 of the Specific Relief Act 1950 not to grant specific performance but damages instead for breach of contract. (para 32)

Case(s) referred to:

Balasubramaniam v. Venkitasan [1985] 2 CLJ 37; [1985] CLJ (Rep) 403 HC ***(refd)***

Charles Grenier Sdn Bhd v. Lau Wing Hong [1997] 1 CLJ 625 FC ***(foll)***

Cheng Chuan Development Sdn Bhd v. Ng Ah Hock [1982] 1 LNS 48 FC ***(refd)***

Counturier v. Hastie [1856] 5 HLC 673 ***(dist)***

Daiman Development Sdn Bhd v. Matthew Lui Chin Teck & Anor Appeal [1981] 1 MLJ 56 ***(foll)***

Daiman Development Sdn Bhd v. Matthew Lui Chin Teck and Anor Appeal [1978] 2 MLJ 239 FC ***(foll)***

Lai Mew Seng v. Cosmopac Sdn Bhd [1998] 1 CLJ 713 HC ***(foll)***

Narayanan Chettiar Raman v. Samuel Jivamoney Dass Chelliah [1986] 1 CLJ 579; [1986] CLJ (Rep) 547 HC ***(refd)***

Rajeswari Thedshanamurthy v. Kin Nam Realty Development Sdn Bhd [1982] CLJ 82; [1982] CLJ (Rep) 716 HC ***(foll)***

Sandrifarm Sdn Bhd v. Pegawai Pemegang Harta Malaysia [2000] 3 CLJ 313 CA ***(refd)***

Yeo Long Seng v. Lucky Park (Pte) Limited [1971] 1 MLJ 20 ***(foll)***

Legislation referred to:

Contracts Act 1950, ss. 21, 74

Housing Developers (Control and Licensing) Regulations 1989, reg. 11, sch G

Rules of the High Court 1980, O. 81 r. 1(a)

Specific Relief Act 1950, ss. 18(2), 21

For the plaintiffs - Mohd Taufik Dato' Md Tahir; M/s Taufik & Assoc
For the defendants - Albert Chui Chee Sun; M/s Azlan Chui & Co

Reported by Amutha Suppayah

JUDGMENT

Suraya Othman J:

[1] Enclosure 12 is the plaintiffs' application under O. 81 r. 1(a) of the Rules of the High Court 1980 for, *inter alia*, the following reliefs:

(a) Specific performance of sale and purchase of property identified as Unit No. SD3-216, Phase 2A3, Project Bukit Istana together with one double-storey semi-detached house DSSD Italian type to be built thereon at the price of RM321,000 by the defendant;

(b) Damages in addition to or *in lieu* thereof;

(c) Interests; and

(d) Costs.

[2] Briefly, the facts of the case are as follows. By a Pro Forma Sale and Purchase Agreement dated 6 February 2006, the plaintiffs have agreed to purchase from the defendant a property known as Unit No. SD3-216, Phase 2A3, which is located at Kuantan's so-called Prime Precinct of Bukit Istana together with one double-storey semi-detached house DSSD Italian Type to be built thereon at the price of RM321,000. On the same day the Pro Forma Agreement was signed, the plaintiffs paid a deposit of RM5,000 to the defendant. Pursuant to clause 2 of the Pro Forma, the defendant was supposed to forward the official sale and purchase agreement to the plaintiffs for their execution which it failed to do so. The plaintiffs then commenced this action for specific performance. Subsequently after the filing of this action, it was discovered that the property had actually been sold to one Lai Chooi Peng on 23 February 2005. Hence, the present application.

[3] The defendant sought to defeat the plaintiffs' claim and the present application by raising the following defences:

1. The Pro Forma was never intended by both parties to be binding, ie, the defendant claims that there was *no consensus ad idem*; and

2. Even if there was a binding agreement, the agreement is void on grounds of common mistake as both parties were mistaken as to the availability of the said property for sale at the time of contract.

[4] Having perused the affidavits and the submissions filed by both parties, I believe the facts of this case are relatively straightforward as all the relevant documents exhibited are very clear. I shall now deal with the issues raised by the defendant with ease.

1. Was There A Valid And Enforceable Agreement Between The Plaintiffs And The Defendant?

[5] The law in this regard is crystal clear. When the parties of the transaction have been identified with sufficient clarity, together with the subject matter of the contract in question, the price and the terms the parties considered essential, there is a valid and enforceable contract: *Charles Grenier Sdn Bhd v. Lau Wing Hong* [1997] 1 CLJ 625, FC; *Sandrifarm Sdn Bhd v. Pegawai Pemegang Harta Malaysia* [2000] 3 CLJ 313, CA; *Daiman Development Sdn Bhd v. Matthew Lui Chin Teck and Anor Appeal* [1978] 2 MLJ 239, FC; *Daiman Development Sdn Bhd v. Matthew Lui Chin Teck & Anor Appeal* [1981] 1 MLJ 56, PC.

[6] Now, let's apply the law to the facts. Firstly, we have the contents of the Pro Forma, the relevant clauses of which are reproduced in verbatim as follows:

PRO FORMA SALE AND PURCHASE

1. Offer to purchase by Purchaser (whose name(s) appear on the reverse) shall only [be] deemed accepted upon payment herein and issuance of the Developer's Official Receipt. No other act(s) shall constitute acceptance.

2. Purchaser shall execute the formal Sale and Purchase Agreement containing such terms and conditions as required by the Developer within fourteen (14) days from the date hereof.

3. Should the purchaser(s) fail to observe Clause 2, the Developer shall have the absolute right and liberty to forthwith rescind the sale of the said unit and to charge and forfeit all payment made by the purchaser(s) towards the purchase price as administrative cost.

...

12. No oral communication shall form part of this contract.

[7] Then, looking at the reverse side of the Pro Forma, I find the names of the purchasers (the plaintiffs), the vendor (the defendant), the property to be sold and the price, all of which form the necessary ingredients for a valid and binding contract. When both sides of the Pro Forma are read together, there can be no doubt that the defendant had contracted to sell and the plaintiffs had agreed to purchase the property identified as Unit No. SD3-216, Phase 2A3, Project Bukit Istana together with one double-storey semi-detached house DSSD Italian type to be built thereon at the price of RM321,000.

[8] Counsel for the defendant, Mr Albert Chui submitted that the Pro Forma was not intended to be a binding agreement as it had been the intention of the parties that the plaintiffs were free to change their minds and could choose other units at any time before the official sale and purchase agreement was signed.

[9] This submission by the defendant clearly runs counter to the terms of the Pro Forma reproduced above. Clause 3 expressly gives the defendant the right to rescind the sale of the property and to forfeit the RM5,000 deposit if the plaintiffs failed to execute the official sale and purchase agreement within fourteen days from the date of the Pro Forma. This must mean that the plaintiffs are contractually bound to execute the official sale and purchase agreement which is embodied in statutory form known as Schedule G of the Housing Developers (Control and Licensing) Regulations 1989.

[10] As Winslow J observed in *Yeo Long Seng v. Lucky Park (Pte) Limited* [1971] 1 MLJ 20 at p. 22:

> The object of the Ordinance and Rules made thereunder is to control developers and to protect *bona fide* purchasers. If, therefore, a purchaser had agreed in a document such as AB2 to purchase a particular lot in question form the defendants according to the terms set out in that document, having paid a booking fee of $500, which the law has seen fit to provide as the only amount which a vendor could demand as first deposit, and if at all that remained to be done by the purchaser was to sign a document as required by the Rules, I find it difficult to understand how any complaint can be made that when the plaintiff or anybody in his situation signed the document after, at the same time, having paid the booking fee, there was no legally enforceable contract at common law, at least, between the parties.

[11] In *Rajeswari Thedshanamurthy v. Kin Nam Realty Development Sdn Bhd* [1982] CLJ 82; [1982] CLJ (Rep) 716, the defendant employed a document of the same effect by the name of "booking application" and incidentally, also involved the sale and purchase of properties in Kuantan, Pahang. Wan Hamzah J (as he then was) held at p. 718:

> As to contention (a) it was submitted on behalf of the defendant that the parties have not fixed the term as to the method of payment and other terms for the sale and purchase agreements and by that reason and for the reason that the sale and purchase agreements have not been signed by the parties there is no binding contract between it and the plaintiff. In fact the method of payment is fixed by the law in r. 12(1)(e) and Schedule C of the Housing Developers (Control and Licensing) Regulations 1970, and the parties are bound to adopt that method. I hold that in respect of each sub lot there is a binding contract between the defendant and the plaintiff which has been reduced into writing in the form of the document to which I have referred earlier and which both parties have signed, and in which one of the undertakings on the part of the defendant is that it should get its solicitors to prepare the sale and purchase agreement, which undertaking the defendant is found to perform.

[12] In short, the Pro Forma was a valid and binding agreement and a *fortiori*, an agreement enforceable at law to ensure that the parties, ie, not only the plaintiffs but also the defendant, executed the official sale and purchase agreement embodied under Schedule G of the Housing Developers (Control and Licensing) Regulations 1989. That would be in line with the intention of the parties as expressed by the terms of the pro forma and also in line with statutory requirements that the sale of such houses is in compliance with reg. 11 of the Housing Developers (Control and Licensing) Regulations 1989.

[13] In this respect, I am also obliged to quote what my learned brethren, Abdul Malik Ishak J (as he then was) said in *Lai Mew Seng v. Cosmopac Sdn Bhd* [1998] 1 CLJ 713 at p. 741:

> In my judgment, the booking Pro Forma in the present case, couched in the language employed therein when read together with the pleadings, the affidavits and the correspondence exhibited thereto and when applying it to the Act and having the benefit of the Daiman Development's case - all point to one direction only. The direction would be that the Booking Pro Forma constituted a binding contract between the aggrieved plaintiff and the recalcitrant defendant. The execution of the sale and purchase agreement which was cleverly worded as an 'option agreement' in order to cloud the issued, was but a mere formality. The Booking Pro Forma cannot by any stretch of the imagination be construed to make the contract between the parties a conditional contract.

[14] Equity regards as to substance, not form. So, following the case of *Charles Grenier Sdn Bhd* and *Sandrifarm Sdn Bhd (supra)* and with reference to the authorities cited above, whether the document in question is a pro forma sale and purchase agreement, option agreement, booking application or by whatever name the developer so fancies, it is the duty of the court to scrutinize the contents of these documents and having regard to all the surrounding circumstances, determine what the actual intention of the parties were.

[15] I also noticed from the Pro Forma that there is a discount of RM6,000 from the original price of RM327,000 which I believe is evidence of prior negotiations between the parties before the parties came to an agreement for the sale and purchase of the property at the price of RM321,000.

[16] I therefore agree with counsel for the plaintiffs, Encik Taufik that the defendant, having agreed to the terms therein, all of which have been reduced in writing, must not thereafter be allowed to blow hot and cold, even more so when the terms were set by the defendant itself in its own Standard Pro Forma Agreement for its Bukit Istana Project.

[17] At this juncture, it is interesting to note that this case bears a striking resemblance to the facts in the cases of *Daiman Development Sdn Bhd* and also *Rajeswari Thedshanamurthy (supra)*, in fact quite on all four corners with our present case. A testimony that history repeats itself and the conclusion I must arrive at is quite obvious.

[18] Following the authorities I have referred to so far, I therefore hold that the pro forma constituted a valid and binding contract between the plaintiffs and defendant.

2. Was The Pro Forma Void On Grounds Of Common Mistake?

[19] Mr Albert Chui then raised the defence of common mistake. He submitted that at the time the Pro Forma was signed between the plaintiffs and the defendant, the property has already been sold to a third party, one Lai Chooi Peng, and therefore, both the plaintiffs and defendant were mistaken as to the availability of the property for sale. As a result, the Pro Forma must be taken to be void.

[20] Mr Albert Chui sought to rely on s. 21 of the Contracts Act 1950 which provided:

> Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

[21] He also made reference to illustration (a) to s. 21 of the Contracts Act 1950 which says:

> A agrees to sell B a specific cargo of goods supposed to be on its way from England to Kelang. It turns out that before the day of the bargain, the ship conveying to cargo had been cast away and all the goods lost. Neither party was aware of the facts.

[22] He argued that both the plaintiffs and defendant were unaware that the property had already been sold to a third party at the time the pro forma was signed. The agreement was therefore void. With due respect, this argument cannot and does not hold water.

[23] Firstly, s. 21 employs the words "Where BOTH the parties ...". Hence, it is very clear that in the present case, it cannot be said that BOTH the parties were mistaken for the simple reason that the only party who had the exclusive knowledge that the property has already been sold to a third party must be the defendant developer. The plaintiff purchasers must be taken to have no knowledge of this fact for if they had, they would not have purchased the property in the first place.

[24] Secondly, illustration (a) to s. 21 of the Contracts Act 1950, which in essence, is our codified reference to the English case of *Counturier v. Hastie* [1856] 5 HLC 673, is clearly distinguishable from the facts of the present case today for the following reasons.

[25] The words "Before The Day" refer to a few days before the agreement in the illustration was entered into. If the property in our present case had been sold only a few days before the pro forma was signed, then perhaps, and I caution to say, perhaps, the defendant might have mistaken. However, the property in question was actually sold to one Lai Chooi Peng more than a year before!

[26] Next, the phrase "... Neither Party was aware of the fact ..." refers to a situation where both parties had no knowledge of the fact that the subject matter in question is no longer available for sale. Contrast this with the facts of our case - the defendant vendor should have known that the property had already been sold to a third party, even more so when the sale had taken place more than a year ago. The plaintiff purchasers would not have known. Only the defendant could have known this but its agents or employees never conveyed this fact to the plaintiffs before the pro forma was signed.

[27] In the premise, I do not see how the defendant can rely on the doctrine of common mistake to render the contract void in the present case when clearly the mistake was a direct result of the defendant's own wrong-doing.

[28] We are not sure what the defendant's motives are but any mistake, if genuine, would have been discovered by the defendant during the fourteen days when the official sale and purchase agreement was to be prepared for the execution of the plaintiffs as per the terms of the pro forma. Yet the defendant took more than three months to inform the plaintiffs that they were unable to complete the transaction. It would seem also that the defendant has concealed many material facts from the plaintiffs before the pro forma was signed. The defendant never mentioned to whom and when the property was sold, not even after this action was filed. It later transpired that the property had actually been sold more than a year ago before it was purportedly sold again to the plaintiffs. The defendant even sought to absolve itself from liability by simply returning the RM5,000 deposit to which the plaintiffs strongly refused to accept.

[29] The totality of the facts show that the defendant had not come with clean hands. With this in mind, I am again inclined to refer to the case of *Lai Mew Seng v. Cosmopac Sdn Bhd* [1998] 1 CLJ 713 where Abdul Malik Ishak J (as he then was) made the following observations summarized at para [7] under "held":

> As a licensed housing developer, the defendant was governed by the Housing Developers (Control and Licensing) Act 1966 ('the Act') and the Housing Developers (Control and Licensing) Regulations 1989 ('the Regulations') which were made thereunder. The Act and the Regulations are meant to protect purchasers like the plaintiff and must be brought to bear upon the defendant, a developer who went to a neighbouring country to woo purchasers and having so wooed tried to resile from the booking pro forma. That was an unethical conduct and an unscrupulous developer.

[30] Similarly, in our present case, in upholding the spirit of the Act and the legislation's intention to protect house buyers, this court cannot therefore allow the defendant to shy away from its obligations under the Pro Forma.

[31] I am satisfied that there are no triable issue in this application and summary judgment should be entered against the defendant.

[32] It is this court's judgment that the Pro Forma constituted a valid and binding contract between the plaintiffs and the defendant. However, since the property in question has already been sold to a third party, specific performance would not be appropriate. I will exercise the discretion vested in me by virtue of section s. 18(2) and 21 of the Specific Relief Act 1950 not to grant specific performance but damages instead for breach of contract.

Quantification Of Damages

[33] The plaintiffs are entitled to damages under s. 74 of the Contracts Act 1950 (Act 136). The law is settled in that in assessing damages for breach under s. 74, the assessment should be based on the date of the breach itself.

[34] The plaintiffs submitted the case of *Narayanan Chettiar Raman v. Samuel Jivamoney Dass Chelliah* [1986] 1 CLJ 579; [1986] CLJ (Rep) 547 where LC Vohrah J, awarded RM10,000 as compensation for damages for breach in lieu of specific performance. In that case the vendor agrees to sell a piece of land to the purchaser for the sum of RM47,000. Since the court cannot ascertain the market value of the property at the date of the breach less the contract price, the court awarded RM10,000 which is 21.3% of the agreed purchase price.

[35] The plaintiffs also submitted another case, *Yeo Long Seng v. Lucky Park (Pte) Ltd* [1971] 1 MLJ 20 where Winslow J awarded RM12,000 as compensation for damages for a property agreed to be sold by the developer to the purchaser at RM52,000 which is 23% of the purchase price.

[36] Using these two cases above, the plaintiffs submitted that the same formula be adopted by this court in coming to the proper assessment of damages ie, 22% of the agreed purchase price of RM321,000 which comes up to RM70,000 be awarded to the plaintiffs.

[37] The defendant submitted the case of *Balasubramaniam v. Venkitasan* [1985] 2 CLJ 37; [1985] CLJ (Rep) 403 where Shankar J, as he then was, state as follows:

> The Plaintiff had contracted to buy the said land for $2,000. But on the date of the breach of this contract the land was worth only $1,450. He therefore did not suffer any damages by way of loss of bargain. Nothing therefore falls to be paid to him by way of general damages on the 70% formula which the parties have agreed upon. But the plaintiff did pay $500 upon signing the agreement and a further $1,100 on November 4, 1970. These payments were made for a consideration which has wholly failed and I accordingly ordered that the defendant to pay the plaintiff the sum of $1,600.

[38] The defendant also submitted another case *Cheng Chuan Development Sdn Bhd v. Ng Ah Hock* [1982] 2 MLJ 222 where the Federal Court held at p. 227 as follows:

> The respondent is only entitled to a sum of money which would compensate him for the loss which naturally arose from the breach. He sustained the loss only when he was deprived of the opportunity to buy the shophouse, and this surely occurred when the appellant sold the house to a third party and not subsequently. It was only on that date that he was to have the house sold to him but it was on that date the house was sold to someone else. Thus if he had a to buy the house or another house as a substitute therefore on that date he would have to pay $85,000. In other words he had to find an extra $35,500 over and above the $49,500 contract price. That is the amount which could be regarded as naturally following from the breach by the appellant. In fact the law on the subject is already settled in that in the case of breach of contract assessment of damages has to be made as on the date of the breach. *Engell v. Fitch* [1868-1869] LR 4 QB 659, 669 and *Lee Heng & Co v. C Melchers & Co* [1963] MLJ 47.

[39] In our present case the plaintiffs has submitted that the current market value of the property is RM325,000. Following the two cases above cited by the defendant, if the plaintiffs were to buy another house as a substitute he would need (RM325,000 - RM321,000) which is the current market value of the house minus the contract value which comes to RM4,000. Therefore the loss due to the plaintiffs is norminal which is RM4,000.

[40] The court also took into consideration the fact that the defendant did try to mitigate by offering to sell another house of similar size and built to the one which it contracted to sell to the plaintiffs, which offer the plaintiffs rejected.

[41] Therefore based on all these considerations above, the court feels that RM4,000 is sufficient as compensation for damages *in lieu* of specific performance.

Conclusion

[42] The Pro Forma constituted a valid and binding contract between the plaintiffs' and the defendant. The defendant had breached the contract and the plaintiffs' had suffered losses. In that light, the plaintiffs are entitled to summary judgment under O. 81 r. 1(a) of the Rules of the High Court. Application of the plaintiffs is thereby allowed.

[43] I therefore make the following orders:

(i) Specific performance is not allowed since the house has already been sold to a third party;

(ii) Damages *in lieu* of specific performance in the sum of RM4,000 to be paid to the plaintiff;

(iii) Interest at 8% per annum from the date of filing of writ to the date of realisation;

(iv) Defendant to refund the deposit of RM5,000;

(v) Cost;

(vi) Payment into court of RM500 to be returned to defendant.

Plaintiffs' application allowed with cost.